

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF
THE TTAB

Mailed: August 21, 2003

Paper No. 13
ejs

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re L.I.D. Ltd.

Serial No. 76/226,296

Ezra Sutton of Ezra Sutton, P.A. for L.I.D. Ltd.

Robert Clark, Trademark Examining Attorney, Law Office 108
(David Shallant, Managing Attorney).

Before Cissel, Seeherman and Hohein, Administrative
Trademark Judges.

Opinion by Seeherman, Administrative Trademark Judge:

L.I.D Ltd. has appealed from the final refusal of the
Trademark Examining Attorney to register ARIELLA as a
trademark for "diamonds and diamond jewelry."¹ Registration
has been refused pursuant to Section 2(d) of the Trademark
Act, 15 U.S.C. 1052(d), on the ground that applicant's mark

¹ Application Serial No. 76/226,296, filed March 6, 2001,
asserting first use and use in commerce as of August 2000.

so resembles the mark ARELLA, previously registered for jewelry,² that, as used on applicant's goods, it is likely to cause confusion or mistake or to deceive.³

Applicant and the Examining Attorney have filed briefs. However, in his brief the Examining Attorney has directed his comments to the refusal based on the registration which was cited in the initial Office action, which refusal was subsequently withdrawn. See footnote 3. Accordingly, we have given the brief no consideration.⁴

² Registration No. 2,502,719, issued October 30, 2001.

³ The application has had a somewhat complicated prosecution history. In the first Office action, the Examining Attorney who initially examined the application refused registration on the basis of Registration No. 1,512,607, and advised applicant that Application No. 75/756,441, if it matured into a registration, might be cited against applicant's application. (The Examining Attorney also required applicant to indicate the significance of the mark. Although applicant did not respond to this point, the Examining Attorney never repeated the requirement, so this is not an issue in the appeal). In the second Office action, the Examining Attorney withdrew the refusal based on Registration No. 1,512,607, and cited Registration No. 2,502,719, which issued into a registration from Application No. 75/756,441. The Examining Attorney incorrectly made the refusal final, despite the fact that applicant had not had an opportunity to respond to the refusal based on this registration. However, that Office action also indicated that applicant could respond to each of the points raised in the Office action, and advised applicant to telephone the Examining Attorney if it had any questions or needed assistance in responding to the Office action. Applicant subsequently did file a response addressing this refusal, and the present Examining Attorney issued a new final refusal. Accordingly, we see no need to remand the application at this point to correct the mistake of the first Examining Attorney.

⁴ We are frankly surprised that the present Examining Attorney, who obviously believes that there is a likelihood of confusion with the registered mark ARIEL, did not reinstate the refusal based on this registration when he took over the examination of the application.

Applicant did not request an oral hearing.

Our determination of the issue of likelihood of confusion is based on an analysis of all of the probative facts in evidence that are relevant to the factors set forth in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Applicant's goods are identified as "diamonds and diamond jewelry"; the cited registration is for "jewelry." "Diamond jewelry" is, of course, encompassed within the term "jewelry," and therefore the goods must be considered, in part, as legally identical.

When marks would appear on virtually identical goods or services, the degree of similarity necessary to support a conclusion of likely confusion declines. *Century 21, Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). The marks in question are ARIELLA and ARELLA. The substantial similarities in appearance and pronunciation of the marks are obvious. It is not clear whether consumers would ascribe a particular significance to either mark, or would

simply regard both as arbitrary terms. However, they do not have clearly different connotations. Thus, we find both marks to convey very similar commercial impressions.

Applicant has argued that the cited registration is entitled to a limited scope of protection because there are six third-party registrations for marks which begin with the letters "AR."⁵ Third-party registrations are not, contrary to applicant's argument, evidence that the marks are in use. Thus, they do not support applicant's contention that purchasers have been conditioned to look to the other elements of the marks. Third-party registrations are probative to the extent that they may serve to suggest that a portion of a mark has been adopted to convey the dictionary meaning or suggestion of that portion. See *Tektronix, Inc. v. Daktronics, Inc.*, 187 USPQ 588 (TTAB 1975). However, the fact that several marks begin with the letters "AR" does not show that "AR" has a particular meaning or significance in the jewelry field. This is clearly borne out by the different meanings or impressions conveyed by the third-party registrations which have been

⁵ The data relating to these applications/registrations appear to be from a private company's records, rather than the records of the U.S. Patent and Trademark Office. Such records would normally not be acceptable but, because the Examining Attorneys discussed the registrations, we consider them to be stipulated into the record.

made of record, namely, ARENA, ARIES, ARIUS, ARIEL, ARIANA and ARIETTA.⁶ The only third-party mark that is similar to applicant's mark and the cited mark is ARIEL. However, the presence of this registration is not sufficient for us to find that the scope of protection accorded the registration for ARELLA does not extend to prevent the registration of ARIELLA for identical goods. ARELLA is not as similar to ARIEL as ARELLA is to applicant's mark ARIELLA, nor for that matter is it as similar to ARIEL as applicant's mark ARIELLA is.

Decision: The refusal of registration is affirmed.

⁶ The latter two marks were the subject of applications at the time applicant made them of record, but the applications have since matured into registrations.